USE AND ABUSE OF INJUNCTIONS IN TRADE DISPUTES

I. Address by Jackson H. Ralston, Esq., Washington, D. C.

For a number of years, the use and the abuse of the injunctive powers of courts have met with the determined protest of labor organizations and acute criticism on the part of some judges and many students of jurisprudence. Too often the growth of this branch of law brings to mind the traditional origin of the old streets of Boston. There, near three hundred years ago, the barefoot progenitors of many of us, driving cows to and from pasture would wander from a straight line, perchance to gather wild flowers, if they were sufficiently esthetic, or to escape a stubborn bowlder or marshy spot or to obtain a vantage point from which to throw a stone at their equally thoughtless charges. And this Odyssey of wanderings sufficiently repeated created a pathway which, in later years, has caused numberless passersby countless pangs of fatigue, or at least hours of uncertainty as to whether the streets were really "going south or coming back." So our judges, beguiled by rhetorical fancies or disturbed by the rudeness of the labor of thinking, or desiring to throw a stone at something with which they entertained no bond of human sympathy and which, therefore, deserved such evidence of disapproval, have beaten a pathway no less and no more logical than the ways of the older streets of Boston. But detailed criticism of the mental operations of judges forms no essential part of the purpose of this paper. We shall rather seek to discover, if we may, where the straight path of logic would lead us.

Let us assume one principle to be settled in the law and in its practice—that is, that the jurisdiction of equity in injunction extends only to the protection of property, the improvement or destruction of which could not adequately (meaning exactly or not at all) be compensated for in damages. The question which we must clearly answer, and which, if answered will serve as a touchstone is, what is this property which must be so protected? If a man crosses another's land or threatens to do so to-morrow, equity will not intervene unless the trespass may be of such character or so continued as to impair

or to endanger the very existence of the plaintiff's property by creating the foundation of title thereto in another, and in the end depriving the plaintiff of the beneficial enjoyment of that to which he has a legal right. For lesser injury—the mere trespass whether actual or threatened—the property owner is remitted to a suit for damages or has no remedy. We find, in this instance, that the property must have a physical existence.

Let us assume interference with copyright or patents. Here again the right is really physical—the monopoly claimed over the production of palpable objects.

So, if we seek to prevent illegal taxation by the aid of a court of equity, we ask that we may not be disturbed in the possession of our tangible property by being deprived thereof through the action of the taxing authorities.

Again, we are entitled to equitable aid to ensure to us the continual enjoyment of our property against nuisances which affect its value or interfere with its movement from place to place.

But suppose we seek aid against libel or slander, or even the injurious circulation of the truth. Then, quite aside from the serious constitutional question involved, we ask the courts not to protect property as such, but to exercise control over something of the most subtle character—the minds of men. For even as it has been said, that parliament may do anything short of making a man a woman, so it is true equity may do much, but may not, if it would control the character or transmission of thought, and, we are told, equity will not do a vain thing. As well might we, as Burke said, undertake to indict a nation. And yet, when dealing with trade unions, courts have often forgotten what they may protect and what things are inherently beyond their jurisdiction, and to a degree have brought disrepute upon the processes of the law.

Courts have enjoined physical acts of trade unions, such as nuisances or trespasses, which have interfered with the enjoyment or transfer of property. Of this no complaint can successfully be made. They have gone further and have said to members of unions, "You shall not say to another, not of your own membership, 'such a man is an enemy of ours, and we request you do not buy his products until we are fairly dealt with by him.'" Some judges have even said, "You shall not bind each other not to deal with that man." Those injunctions do not protect property, since the plaintiff's prop-

erty and his right thereto are equally intact, after as well as before, the supposed injury complained of; and his right to gain lucre by transferring it has not been interfered with. His market may have been restricted, not by a physical fact, but by a mental one—the attitude of the purchasers toward the seller, an attitude in which the would-be complainant has no more property than has the liquor dealer facing a wave of temperance in the appetite of his theretofore customers, or a packer in the sale to the public of beef or other special products. We grant that if the customer be driven away by a threat of an illegal character, such as of violence, relief may be sought by analogy at least to the doctrine prevailing in cases of nuisance—that is, where a person in the enjoyment of his property is more injured by the objectionable things than the rest of the community, he has a right to appeal to equity.

May we not believe that when the courts have sought to enjoin men from communicating to their fellows their opinion of another, or of the desirability of the purchase of his products, they have departed entirely from the theory that equity may only defend the rights of property as property, and have sought to create an anomalous right, not defined in any law book, and not being a right of property over which courts of equity have been believed to possess jurisdiction?

We do not, of course, for a moment dispute that the man whose reputation has been injured by word of tongue or pen has a right to be recompensed in a court of law for the injury sustained, and we do recall that there once existed the theory that the greater the truth the greater the libel. This theory—dismissed by courts of law—appears now often to have been taken up by courts of equity, at least, when dealing with trade unions. But if a trade union may truthfully say of a man that his establishment is unfriendly to the cause of organized labor, and no member of organized labor or sympathizer with it should trade with that man, no libel has been indulged in which may be punished by a court of law, and yet, as we have stated, courts of equity will interfere to prevent the making of such a statement and under certain circumstances, punish its making as a contempt. We find, therefore, courts of equity striving to fit upon themselves the cast-off garments of courts of law, and adjudging that the truth is not always to be spoken. Speaking in other terms they indulge in a sort of indirect atavism. Our judges

do this because of, as we may believe, an unconscious bias against a social institution foreign to their immediate environment, much as the bare-foot boy of Boston might have wandered from his true direction to pick up a stone to throw at some urchin who lived on the other side of the creek. And later, judges, without understanding or appreciating the mental attitude of the first judicial traveller, have made their after steps conform to his, not troubling themselves with too painstaking an analysis of the situation.

Sometimes the courts have told us that the employer was entitled to have labor flow freely to him, and some of the most obnoxious of injunctive processes have issued to enforce this supposed right. We grant the correctness of the judicial position, bearing in mind the observations we have already made, if a nuisance has been created interfering with such movement. If there be no nuisance—nothing objectionable in itself to the law, we deny that the employer has the right to appeal to courts of equity to clear away the channels of labor or trade.

For what would be the logical consequences of the contrary doctrine? The man who advertises Achilles shoes, while a competitor declares that Achilles shoes should not be bought, for the heels will quickly give way, would be entitled to an injunction. The department house which advertises to sell better and cheaper goods than another house in the city would be subject to injunction at the hands of its competitors, and if there are two stores in the town dealing in a particular object, the aggrieved merchant could successfully appeal to equity for protection. The manufacturer who publishes that his rotary engines are superior to ordinary piston engines may be haled into court. The cigar manufacturer who begs the community to smoke factory rather than sweat shop cigars, made by another, would be subject to injunction.

In none of these instances has equity been resorted to, nor, I venture to say, would such application be successful, although every such instance falls within the reasoning indulged in by certain courts of equity when they are confronted by such a trade union problem as we have instanced.

Let us consider another landmark of the law and the manner in which it has been treated. Until trade unions assumed importance in the industrial field it was believed to be the law that courts of equity had no jurisdiction over threatened or actual offences save,

at least, certain ones against minors or married women who, by reason of their helplessness were taken under the tender charge of the court, and where the offender had, by his interference with their rights, infringed upon the protection granted them by the chancellor. There was an excellent reason for this general position of the courts. Did a court of equity have injunctive power over crimes it must follow as a consequence that their commission could be inquired into by such courts, and if they were found to have been committed the wrongdoer could be punished therefor as for contempt of court. Thus a court of equity would turn itself into a criminal court, and that which primarily was a forum for the determination of the right of property would become an institution empowered to avenge wrongs done society, while the accused, entitled to a trial by jury of his peers, would be adjudged by one taught by the traditions of his occupation to suppress, as far as might be, all human feelings and to respond only to the cold dictates of logic.

Now, when courts are brought to consider charges against trade unions, speedily they forget the limits of their jurisdiction and enjoin crimes upon the theory, that although they have no right to enjoin crimes *per se,* yet, when the element of possible damage to property is intermingled with the other elements of wrongdoing, so tender would the court of equity be of its litigants that it considers that the crime is included as enmeshed in some way inextricably with the true subject of equitable jurisdiction. We find, therefore, that although equity will not enjoin theft, it will enjoin (at least some judges do enjoin) the injury to a man's business, done when two men ask a third not to trade with him, the two being trade unionists, for no instance except as affecting unionists comes to mind where such injunction has been granted. This is true although the offence, if it be one, has existed in this country since the days when our patriots refused to deal with men who sold tea upon which stamp taxes had been paid.

Judically we are brought to a singular condition. One man may absolutely destroy another's business, may drive him, in order to gain his livelihood, from a community, and the court of equity will hold the offender guiltless, provided only the actor commit no trespass, create no nuisance, indulge in no fraud or do not render himself amenable to some other proper branch of equitable jurisdiction. (To this effect see particularly Haywood *vs.* Tillson, 75 Maine,

225, and Payne *vs.* W. & A. R. R. Co., 13 Lea, 507.) Nor will a court of equity concern itself with the motive underlying such action. It may be that the injured party is most worthy and the aggressor vindictive and malicious, or the reverse may be the case. You will be told that the question of motive or intent is immaterial, that the sole question is whether the moving party was acting within his legal rights, and where several persons in concert, acting within the legal rights of each, and for whatever reason, have declined intercourse of a business nature with another—*the actors not being trade unionists*—and have refused business relations with those who supported the person against whom such action was directed, the courts have, as the writer believes, universally, save as influenced by the Sherman anti-trust act, held such action beyond the injunctive power of the chancellor. (See, for instance, Francis *vs.* Flinn, 113 U. S. 385.)

Let us turn, however, to the position of trade unionists, and see if such cold rules of logic are applied to them. Let us discover, if we may, whether the judiciary has not unconsciously felt the influence of class bias. And in so doing, let us bear in mind the definition oft repeated of the word "conspiracy," which is the combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. When two or more men agree that they will not deal with a given man until he ceases to oppress, as they believe he is doing, by giving insufficient wages; or inflicting excessive and exhausting hours of toil; by destroying the lives of children, by degrading womanhood, they may not, according to very many of the courts, publish to the world the fact, and if they do so, or threaten so to do, they may be enjoined by a court of equity which will treat such publication as an offence against the rights of property. According to the almost unanimous voice of the judges, if they proceed a step further and say that they will not trade with any man who, by the purchase of such employer's products, helps to sustain conditions which, to their minds are evil, they are subject to injunction and if the injunction be violated they have placed themselves in contempt. When such decreees are opposed and violated, the violators are by a single man, who is likely unconsciously to be prejudiced against them by the mere fact of having issued the injunction, found guilty of a new equitable crime—

conspiracy to destroy another's property—the courts ignoring the fact that one may not properly have property in a thing of which he is not possessed, or at least of which he has not in himself the power of compelling the possession.

The argument of Chief Justice Shaw in the great case of Commonwealth *vs.* Hunt, 4 Metcalf, 111, is ignored. As he expressed himself tersely and effectively:

"Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this: that the defendants and others formed themselves into a society and agreed not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman.

"The manifest intention of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. . . .

"Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were that they would not work for a person who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things we cannot perceive that it is criminal for men to agree together to exercise their own acknowledged rights in such a manner as best to subserve their own interests. One way to test this is to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it.

The consequences might be the same. A workman who should still persist in the use of ardent spirit would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skillful, but intemperate, workman. Still, it seems to us, that, as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy."

Why should not the man who threatens to shoot me and thus destroy my ability to carry on my business be enjoined quite as much as the man who declines to purchase my wares, or proclaims that they are inferior or that they are produced under injurious social conditions inflicted upon the worker? Should not uniformity in principle be accompanied by uniformity in practice and all be subjected to injunction or none?

The answer comes that it is not the individual in these cases against whom equity has the right to address itself, but something more subtle and dangerous—that is, the combination. But if an individual man accomplishes the evil, why is not he, and why is not the combination equally liable or non-liable in the eyes of the court of equity? If you say the individual was acting within his right and so not amenable to a court of equity, how does the problem differ in essence if there be two individuals instead of one? And if you say the individual will not be enjoined, because the thing enjoined is a crime, do you escape the difficulty, for is not conspiracy equally a crime? Are courts justified in taking the position that while direct evil as a crime may not be enjoined, the lesser thing, a conspiracy to commit wrong, may be enjoined?

Bearing in mind, as you must, the definition of conspiracy as heretofore given, we may justly wonder what justification there is for the attitude of courts in holding so-called boycotts, even when absolutely peaceable in character, to be conspiracies and the subjects of injunction. Let us see if logically the courts can possibly be right.

If A and B agree to tell their fellows that they will not trade with C and go further and say that they will not trade with any man who trades with C, in what respect have A and B formed an unlawful conspiracy? They have not agreed to use any unlawful means. They have not combined to an unlawful end unless that which is legal for one can be turned into wrong when done by two or more. The vice, it is said, must be found in the purpose of the combination,

which it is argued, is to oppress C. (We may ignore, but not forget the fact that usually trade union combinations as illustrated by strikes and boycotts, are not formed to oppress anyone, but to cause the persons against whom they are directed to ameliorate their policy towards their employees). But if Z, acting within his legal right and with the avowed purpose of driving C out of his business or out of the community, may refuse to employ any persons who deal with him or who board in his hotel and thereby Z works oppression to C, and the courts may declare Z's motives to be immaterial, in what way is the combined act of several logically different and why should it receive different treatment from that accorded to the act of Z? In other words, why is the combination, the intent of which is assumed to be to oppress, more justiciable than the actual oppression? Why do our courts reject, in the case of the single individual, all inquiry into his intent, he acting within his rights, while as to trade unions the wrongful intent is inferred despite all protestations and made part of the gravamen of the complaint, and the foundation of the judicial conclusion. Are our judges thinking clearly or are they simply manifesting the not uncommon aversion of men towards those acts which they deem themselves little likely to commit?

But we are told that the offence is in the combination and the vice of the combination is in its superior power to inflict injury. (We have already sufficiently discussed for present purposes the question whether the combination was one to inflict injury and whether the doing of acts in themselves legal could constitute legal injury). To this we have to say that the courts are indulging in a legal presumption in order to find jurisdiction against several and rejecting the presumption as against one and that jurisdiction should be based upon fact, not upon inference. The fact may be that under given circumstances a combination would be powerless to inflict an appreciable inconvenience, not to say legal injury, whereas under other circumstances one man, acting with no greater and no less right in himself, may bring about ruin to hundreds. If, therefore, we are told that the superior power in the combination to inflict injury is the test, we may surely logically say that the essence of the test is the power to injure and that this may pertain to the single individual as well as to those who act in combination, and we may justly criticise the courts which hold the powerful individual innocent and condemn the impotent combination.

Thus, as we believe, the whole theory of the courts in this regard is founded upon a logical absurdity. Two men may not, in combination, without incurring the anathemas of the court, do the things which each severally may accomplish. A, living at one end of the city, and B living at the other end, without connection with each other may say to their neighbors that they do not intend to trade with Z, in the center of the town, and that their dislike for him is so great that it extends to any person who has dealings with him. These separate declarations are, in the eyes of the court of equity, legally innocent. But if A and B together agree to exactly the same thing, that which before was innocent becomes a conspiracy to oppress, and although called a crime will be enjoined by a court of equity as infringing upon a right of property belonging to Z, which right of property was not discernible by the court when attacked by A and B separately. We have therefore by combination called into being not only a power to restrain a crime, but we have created property where before none existed. We are not able to cite a more remarkable legal performance in the history of jurisprudence.

Let us look at it in another aspect. A has a right to control his own actions absolutely. He may trade where he will and he may withhold his trade. He may declare his intention of withholding his trade and not bestowing it upon any sympathizer with Z. When he does so he will be legally righteous. The same right and power exist in B. When A and B meet together to exercise jointly the rights they possess severally, then, presto! change! the very coming together destroys their individual rights. Instead of retaining the powers and privileges logically indubitably their own, they have entirely lost them.

Why should a conspiracy to injure be enjoined and not the determination, for instance, of a single man to commit arson? While the determination to injure on the part of several individuals by the refusal of trade relations is not, to our minds an injury to property in any true sense, a threat to commit arson is the declaration of an intent to destroy that which is undoubtedly property, yet our courts, preserving in this respect the right to trial by jury, will not enjoin the commitment of arson.

The situation is a peculiar one. A man has a right to refuse in any way he sees fit to trade with another or with that other's sympathizers. He has a right to publish such fact to the world, subject

only to action, if his statements be false. He has a right to enter into a combination, and do any act he might lawfully have a right to do himself, the means to be employed by the combination being peaceable and legal, but when he enters into such a combination he becomes subject to the injunctive power of equity. This is the greatest specimen of "hide-and-seek" logic on the part of the courts that has fallen within our knowledge.

Perhaps all applications to courts of equity for injunction against boycotts, peaceful or otherwise, have alleged that the defendants combined and conspired to injure or oppress the complainant by declaring him "unfair" or refusing to purchase his goods and urging others to do likewise, or refusing intercourse with those who trade with him. If these things be legally wrong in the individual, there must be a right of action on behalf of the public or on behalf of the individual affected against him. If he does these things in conjunction with another his individual liability remains, and he should be held accountable in a court of law, or a criminal court—not in equity. The fact of combination cannot make the end more or less legal or wrongful, since the combination is only the means to an end and in itself good or bad, according to the methods to be employed by it or the end to be gained. In other words, a conspiracy to oppress can only logically exist when the oppression, if an individual act, would be subject to civil judgment or criminal punishment.

Let us illustrate the whole proposition by a simple case. If A, the owner of a newspaper, advises his patrons against trading with C, because C treats his employees unfairly he may not be enjoined by a court of equity, however injurious such publication may be. If B becomes a partner with A, and thereafter similar public accusations are made, then, by the logic of a great many of trade-union decisions, however truthful such publications may be as statements of fact, A and B are subject to injunction. Wherein lies the reason for this?

Within the past hundred years many men have served terms in jail in New York, Pennsylvania, New Jersey and other states for the simple act of quitting their labors in order to secure a reduction of hours per day or to obtain some other industrial end. That the judges who sentenced them were wrong as to their conception of justice or law need hardly be argued to-day, either before the bar of public opinion or before the courts. But the reasoning in which the lower courts indulged when convicting them was in all

respects, in principle and almost in words, that employed to-day when the judge enjoins the existence of a peaceful boycott. In either case it has been argued that the vice of the offense existed in the combination, that the employer was unable to struggle against such combination, that it disarranged his business and reduced his profits.

The sole essential difference between the two situations is that in the case of the strike the power of production of the employer was diminished, in the case of the boycott the power of disposition of the products when completed was lessened. The essential thing, the ability to carry on business according to the whim or desire of the employer, was restricted. The decision of Chief Justice Shaw in Commonwealth *vs.* Hunt marked a distinct difference in the treatment of trade unions by the courts, and the exact logic of his decision has received acceptance, boycotts being in question, at the hands of such judges as Justice Caldwell, of Arkansas, and Chief Justice Parker, of New York, while Justice Holmes, in his dissenting opinion in the case of Vegelahn *vs.* Guntner (167 Mass., 92), found occasion to say that "There is an opinion which lately has been insisted upon a good deal, that the combination of persons to do what any one of them lawfully might do by themselves will make the otherwise lawful conduct unlawful. It will be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many of the courts, I think it plainly untrue, both on authority and on principle."

If there be yet doubt in the minds of my hearers, that the courts of equity have been illogical in the treatment of trade unions, listen a moment to the utterance of the Earl of Halsbury in the case of Quinn *vs.* Leatham (Appeal Case, 1901; Law Reports, p. 506), a case often cited against trade unions, wherein he says, referring to the language of the case of Allen *vs.* Flood (Appeal Cases, 1, 1898), considered as favorable to them:

"I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

In view of the confusion of ideas and logic in which courts have involved themselves, it is natural that trades organizations and

other thinkers upon the subject are little disposed to await the long course of years which would necessarily pass until reason could triumph in judicial tribunals with reference to boycotts as it did with regard to strikes after the decision in Commonwealth *vs.* Hunt. It is not to be expected that leaders of unions will accept with equanimity injunction after injunction and sentence after sentence for contempt, in the hope that at some time or other, during the life of the present or a succeeding generation, courts will recognize their blunders, and the sufferings of the present will be atoned for by judicial triumphs in an indefinite future. And as the courts cannot help themselves within reasonable time, labor organizations have appealed, and doubtless will continue to appeal, for justice to the legislative branch of the government. The line their appeal will take is shown by several existing or proposed acts, notable among which is the "British Trades Dispute Act" of 1906, the substance of which is as follows:

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other persons to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.

"An act against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court.

"Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section 9, excepting in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

Even before this act was adopted the law of England had been liberalized, and, largely based upon the legislative expression of such liberality, a bill was prepared and introduced into the House of Representatives of the United States reading as follows:

"That no agreement, combination or contract by or between two or more persons to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the District of Columbia or in any territory of the United States, or between employers and employees who may be engaged in trade or commerce between the several states, or between any territory and another, or between any territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be deemed criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person should not be punishable as a crime, nor shall such agreement, combination or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto. Nothing in this act shall exempt from punishment, otherwise than as herein excepted, any person guilty of conspiracy for which punishment is now provided by any act of Congress, but such act of Congress shall, as to the agreements, combinations and contracts hereinbefore referred to, be construed as if this act were therein contained."

This bill three or four times passed the House of Representatives, to be pigeonholed in the Senate Judiciary Committee, save on one occasion when Senator Hoar reported it favorably. Immediately thereafter, however, upon the urgent representations of certain senators from New York and Connecticut, the bill was recommitted, and thus ended the nearest approach to its adoption in the American Congress.

Meanwhile, the idea contained in the bill became expressed in a law adopted in the year 1903 by the State of California, the act reading as follows:

"No agreement, combination or contract by or between two or more persons to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the State of California shall be deemed criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto. Nothing in this act shall exempt from punishment, otherwise than as herein excepted, any persons guilty of conspiracy, for which punishment is now provided for by any act of the legislature, but such act of the legislature shall, as to the agreements, combinations and contracts hereinbefore referred to, be considered as if this act were therein contained; *Provided,* That nothing in this act shall be construed to authorize force or violence, or threats thereof."

It will be noted, therefore, that the relief denied by the Congress of the United States has been granted in England and California, and, it must be confessed, without resulting in any of the dire consequences which its opponents predicted. It is not recorded that violence and wrongdoing have become, because of the passage of these acts, more common in either of the two jurisdictions where the law has been reduced to logic. Neither have the courts, because of its passage, become less efficient in any direction in which they might justly act.

Just as an appeal to the representatives of the people to correct judicial blunders with regard to the responsibilities assumed by one employee for the act of another was imperatively necessary, so likewise is such an appeal compelled by the course of events against the abuse of the injunctive powers of courts.

USE AND ABUSE OF INJUNCTIONS IN TRADE DISPUTES

II. Address by Charles E. Littlefield, Esq., New York.

Mr. Chairman, Ladies and Gentlemen:

It is necessary for me at the outset to premise that until I arrived on the platform I was not aware that the subject of the morning's discussion was the use and abuse of injunctions in labor controversies. It is quite true that when I received the invitation to speak before this society, I had notice that I was to speak for fifteen minutes on injunctions; not that it is embarrassing to me, but, as it takes that turn, I want to say that it is a physical impossibility for me, in an extemporaneous speech, to cover this subject in half an hour or an hour and a half, because it is a profound question of many ramifications; it concerns constitutional considerations, and the most I can do is to make some statement, so you will be able to understand what an injunction is and what the relation of the injunctive power vested in the court by the constitution is to the legislature; how far the legislature can go, not in exercising judicial power, but without invading the judicial power of the court. There is a profound difference between judicial power and the jurisdiction of the court over a subject-matter—the judicial power which the court exercises where it has jurisdiction, a distinction not very well understood not only by laymen, but by those who belong to the legal profession.

In the first place, what is the injunction? what are the remedies open to the citizen when his rights are invaded? First, we get them upon the common-law side of the court, and then upon the equity side of the court. The equity side of the court gives to the suitor a preventive remedy; the common-law side gives a remedial remedy; the equity side seeks to prevent the doing of an injury, the working of damage. The common-law side of the court gives to the suitor damages for the wrong when it is committed, for injury when it is done. The equity side of the court proceeds upon the most intelligent, civilized idea. It seeks to prevent the commission of wrong to prevent the invasion of personal rights. The common-law side gives to the suitor, when his rights have been invaded, a remedy in damages. The office of equity is to preserve the peace.

The office of the common-law side is to get redress in damages in case the peace has been violated and injustice done.

What is an injunction? An injunction is issued by a court of equity. An injunction is issued only when an irreparable injury is threatened. It is only when such circumstances exist that the court has the judicial power to issue a writ of injunction, and that applies to all the controversies to which the human body politic is heir.

Whenever and wherever, under whatever circumstances and between whatever parties, a condition is presented to the chancellor which satisfies him that irreparable harm is likely to be done where the remedy at law is inadequate, his duty, under his oath, is to issue his injunction and prevent the doing of the harm, the accomplishing of the injury. That is the fundamental legal proposition. Unless such a state of facts is presented to the chancellor, he has no power to issue an injunction. Whenever it is presented, it is his duty to issue an injunction and prevent the doing of the irreparable harm, no matter who the parties may be or what may be the subject-matter of the controversy. It is just as much his duty to give to the suitor a writ of injunction to restrain irreparable harm, as it is the duty of the common-law court to open its doors in order that the suitor may get redress for any invasion of his personal rights. They are equally the right of the suitor, and they are both equally binding upon the conscience of the court.

I want to say a word about the constitutional features of this question, because, in my opinion as a lawyer—and I take great pride in saying that the views I entertain upon these legal propositions are now precisely what they were before I became, and while I was, a member of the National House, and the fact that I became a member thereof, vested with a little brief authority, with authority to say what I should do in the matter of legislation, did not prevent their remaining precisely the same.

I have the utmost contempt for the alleged lawyer who allows his legal views to be colored or distorted by the political situation in which he happens to find himself, and I do not care what office he holds, whether it be from the highest to the lowest, whether it is executive or legislative. From my point of view, the law is not only no respecter of persons, but it has not any political affiliations. It is neither Democratic, Republican, socialistic, anarchistic nor communistic. It is precisely the same to whomsoever it may be applied. It does not even play hide and seek with any of these propositions.

I want to say here, lest I forget it—my friend has called attention in his beautifully and elaborately prepared paper to the fact that courts have issued injunctions because men have said or done this or that in connection with labor controversies. I challenge my learned friend, and any other learned friend that represents that side of the controversy, to put his finger on a single decision where an injunction has been issued preventing a man from doing an individual act, or where a man has been haled into court for contempt because of violation of an order of the court; I challenge him to produce a case, from the beginning to the end of time where cases have been reported, where a judge has issued an injunction or where a court has punished a man for violation of an injunction, where the act was not held to be done in furtherance of a conspiracy against some other man. Mark, it is not a question of slander or libel.

My proposition is that he cannot produce a case that is not based upon a combination or conspiracy. I am stating it in his presence. He cannot produce a single case where any court has restrained a man in his alleged free right of speech and his alleged free right of the press, where it will not be found to be an act claimed to be a part of the carrying out of a criminal conspiracy, or a conspiracy against the right of another man to do business or get employment. It is not in the books, and it is trifling with this discussion to stand in the presence of this audience and criticize the right of injunction because men have been restrained, and disguise the fact that under the circumstances and in every case it is because the right of speech was used for the purpose of making effective a conspiracy—a boycott, not the kind he mentions, but the same kind discussed in the case of Callan *vs.* Wilson, 127 U. S., 540. I understood him to say this morning that a boycott was an innocuous proceeding, that it was the coming together of a few individuals, against which a man had no right to complain. Let us return to this case, Callan *vs.* Wilson. It seems that Callan was the unfortunate subject of a musicians' organization's ill-will in the District of Columbia, who gathered themselves together and decided, inasmuch as Mr. Callan was not doing what they wanted him to do, they would boycott Callan and prevent his doing what he wanted to do, unless he did it as they wanted him to do it. Callan went to the courts and accused these men of being guilty of conspiracy. Mr. Wilson was convicted by a magistrate. He was not

tried by a jury, but by a single magistrate. My learned friend brought a writ of habeas corpus to release Wilson on the theory that a boycott was then a grave offense, not a minor but a grave offense, so grave that the man was entitled to trial by twelve men, and the Supreme Court of the United States sustained the contention made by my learned friend, and held that this boycott he refers to now was what?—"a consipiracy, such as is charged against him and his co-defendants, is by no means a petty or trivial offense."

If I got the significance of his paper this morning, it was no offense at all here and now, but then and there, when he was undertaking to get the benefit of the law of the land, it was by no means a trivial offense, and the court said, further, "It is an offense of a grave character, affecting the public at large." My friend does not seem to realize what it is that gives it this grave character. If he had looked up the case of Callan *vs.* Wilson, he would have seen that it was the effect on "the public at large" that made it of "a grave character." Now, as to the question as to whether a boycott is innocuous or whether it is an offense of a grave character, I appeal to my learned friend in the case of Callan *vs.* Wilson, when he succeeded in getting the Supreme Court to hold with him that it was an offense of a grave character. I want to say a word about the writ of injunction and the uses to which it is put. Bear in mind the definition with which I began, that it is preventive in its character, to prevent the commission of a wrong under circumstances where irreparable injury is about to be done with no adequate remedy at law. Perhaps I should read what the courts have held irreparable injury is. "Irreparable injury as used in the law of injunction does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great, and the fact that no actual damages can be proved, so that in an action at law a jury could award nominal damages only, often affords the best reason why a court of equity should interfere where the nuisance is a continuous one; . . . where an injury is of such a nature that it cannot be adequately compensated in damages or cannot be measured by a pecuniary standard it is irreparable. . . . Irreparable injury justifying the issuance of an injunction may be such either from the nature of the injury itself, or from want of responsibility in the person committing it." ("Words and Phrases," vol. iv, pp. 3772-3.) That is what the courts have said irreparable injury is.

Whenever these conditions are presented in any controversy, no matter what question may be in dispute, in a controversy involving personal property, or personal rights, without which existence itself would practically be a failure, the legal principle is precisely the same. I challenge the production of any case, from the old common-law cases, hundreds of years before the constitution was written by the fathers, from then until now, where an injunction has been issued which was not predicated upon this fundamental proposition. The fact that they were not formerly applied largely to labor controversies simply illustrates the fact that we have a development of social conditions involving the application of fundamental principles of law; but do not let us get the idea that the only use of injunctions is in connection with labor controversies. Let me give you a very brief list of subjects where the writ of injunction is used, and necessarily used. Infringement of patents, copyrights, trade marks, restraints of trade, unfair competition, interference with water rights, pollution of water. An injunction may also be used in restraining nuisances, and in connection with mines and mining rights, to prevent trespass upon real and personal property, fraudulent sale of property, breaches of trust, to enforce rights of *cestui que trusts* against trustees, to prevent the prosecution of cases before foreign courts where litigants have gone in an attempt to secure different results from that reached where the case was first brought, and in connection with violations of the Sherman Anti-Trust Law.

This audience does not need to be reminded that in the conditions of unrest that now prevail throughout the country we have had a vast crop of ill-advised and unconsidered, and in some cases unconstitutional, state legislation, undertaking to deprive public service corporations of their property without compensation by depriving them of the right to secure for the use of their property reasonable compensation. Legislation ill-considered and unconstitutional, the enforcement of which the United States courts have frequently restrained. In these cases a writ of injunction is very beneficial. Also, in restraining public service corporations from making excessive charges and from imposing excessive and improper burdens and conditions upon the people who deal therewith. Also, in restraining the collection of illegal taxes. That is a very familiar use of the writ of injunction. Time and time again, in a great

many of our states, the court of equity has been called upon to restrain the collection of illegal taxes; restraining also the violation of contracts where people have contracted themselves out of a business, and finally in boycotts and labor controversies, but in every instance and in the case of every subject-matter, they are predicated upon the same legal proposition. As a matter of illustration, let me call attention to the fact that from 1903 to 1910, seven years, the Federal Reporters show 386 injunctions upon all these matters, only twenty-four of which were in connection with labor controversies. About six per cent. of the injunctions in the Federal courts were issued in connection with labor controversies during a period of seven years.

Now, I want to say a few words about questions which I believe to be fundamental. I do not believe that the legislature has the constitutional power to limit the judicial power in connection with the issue of a writ of injunction. I want to call your attention to a leading case, and to the lay reader I want to say a few words as to some pending legislation before the American Congress in connection with carrying out some of the alleged promises in what is known as the Republican platform, and I want to say that when I find a fool promise, it makes no difference to me whether it be a Republican or a Democratic platform.

In a Michigan case (25 Mich., 274) the court said:

"It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to *impair the enforcement of rights*. . . . The functions of judges in equity cases in dealing with them are as well settled *a part of the judicial power* and as necessary to its administration as the functions of juries in common-law cases. Our constitutions are framed to protect all rights. When they vest judicial power they do so in accordance with all of its essentials, and when they vest it in any court they vest it as efficient for the protection of rights, and not subject to be distorted or made inadequate. *The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury.* Whatever may be the machinery for gathering testimony or enforcing decrees, the facts and the law must be decided together; and when a chancellor desires to have the aid of a jury to find out how facts appear to such unprofessional men, it can only be done by submitting single issues

of pure fact, and they cannot foreclose him and his conclusions unless they convince his judgment."

And again:

"In all ages and in all countries this distinction by nature, which was never called 'equitable' except in English jurisprudence, where it was first so called from an idea that the rights were imperfect because unknown in the rude ages, when property was scanty, and business almost unheard of in the regions outside of great cities, has been recognized and provided for by suitable methods substantially similar in character. . . . The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any change which transfers the power that belongs to a judge, to a jury, or to any other person or body, is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore."

Note the significance of the language:

"The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury."

It follows, then, that whenever a citizen presents to the chancellor a state of facts which shows that his rights are threatened, the result of which will work irreparable injury without adequate remedy at law, his right is, according to the immemorial practice of the chancellors to the present time, to have the chancellor issue for him the writ without which irreparable injury cannot be prevented. If the chancellor refuses to issue the writ, or if the legislature refuses to allow the chancellor to exercise that right, then you have a situation where the citizen is deprived of his rights. Wherever the condition of facts exists which show irreparable injury without adequate remedy at law, there the suitor is entitled, under the constitution, to the equitable right of injunction, as he is under other conditions entitled to a trial by jury, when it comes to the remedial side of the court. It follows that the legislature cannot prohibit the exercise of that power by the chancellor without interfering with the rights of the citizen. The constitution of the United States provides that the Supreme Court of the United States, and

such inferior courts as the legislature may "from time to time ordain and establish" shall be vested with the judicial power. Congress may create the court, give it jurisdiction over the subject-matter, but when thus created and given jurisdiction, the constitution vests in the court the judicial power. It is just as much the right of the citizen to ask for the writ of injunction as it is to demand a trial by jury, and if he is deprived of it by the legislature he is deprived of a constitutional right just as much as he would be deprived if deprived of the right of trial by jury. Shall a man suffer deprivation of his constitutional right for twenty-four or forty-eight hours? If the legislature can say the order shall not be issued except after forty-eight hours' notice, it can equally well say seven, ten or fourteen days. My opinion is that the legislature cannot impair the judicial power. It is vested in the courts through the operation of the constitution. We inherit the right to the equitable judicial power in the same manner and with the same indefeasible title that we inherit the right to the common-law judicial power.

I want to say here, in passing, that there is not the slightest question to-day of the right of the Federal court to issue a temporary restraining order when proper conditions are presented, without notice and hearing, purely *ex parte*. In the great Debs case, which is the most conspicuous case of its kind, the opinion in which was drawn by one of the ablest men who ever sat in the Supreme Court of the United States, recently passed to his reward, Justice Brewer—in this case there was an *ex parte* order issued. Lyman Trumbull, a distinguished lawyer, made it the first point in his brief that the injunction issued under those circumstances, for the violation of which Mr. Debs had been sentenced to five months' imprisonment, could not be properly enforced against him. The first point made was that the injunction was issued *ex parte*, without notice. The specific point was made, and the court did not dignify it by even a reference to it; so, to-day a restraining order can be issued without notice. Now, because it is understood to be a promise of the Republican party, during the campaign of 1908, a proposed bill provides that when a temporary restraining order has been issued without notice it shall be dissolved after the expiration of seven days, unless the judge sees fit during that time, after notice and hearing, to continue it. It is not within the power of Congress to decree an

injunction. It is only within the power of the court. It is a judicial power. It is for the chancellor to say whether irreparable injury is threatened and whether the complainant shall have an injunction to protect his rights. It is not for the legislature to say by an arbitrary act that at the end of seven days irreparable harm has ceased to be threatened, and that the conditions established by proof no longer exist.

It is for the same judge to determine when the injunction shall be dissolved, or for some other judge or judges to whom an appeal may be made. I do not believe the legislature can arbitrarily, without reference to the merits, say that an injunction shall expire at any specific time, where there are rights requiring continuance of the injunction. The legislature cannot issue, or, in my opinion, dissolve an injunction. This is not a government by the legislature. It is a government of law, and not of men, especially men that sit controlled, as men are in the American Congress, by overpowering political considerations. This is the great fundamental proposition in the constitution, that guarantees to you and to me the enjoyment of the personal rights that were given to us by the Creator to enjoy. For these reasons I believe that the bill now pending is no credit to the administration, nor do I believe it will be any credit to the American Congress if it passes. I am fundamentally and utterly opposed to any infringement by the legislature of the judicial power. Its free and untrammeled exercise is necessary to our freedom, and the maintenance of our rights.

I want to say a word about this platform. I want to say, first, that this plank in this platform placated nobody, appealed to nobody, was commended by nobody. The representatives of the American Federation of Labor had a right to present their contention to the conventions. The American Federation of Labor looks upon this plank with contempt. They wanted some legislation that carried out some ideas they had. The Republican party merely threw a tub to a whale, and I want to say it was a mighty poor tub. The whale was entitled to better treatment. The demand should have been refused in a manly and courageous way. Instead of this, a rhetorical subterfuge was adopted. The plank reads: "The Republican party will at all times uphold the authority and integrity of the courts, state and Federal, and will ever insist that their powers to enforce their process, and protect life, liberty and property shall

be preserved inviolate." I would like to know whether a piece of legislation that undertakes to dissolve an injunction issued by the court to protect my rights, where I am threatened with irreparable injury, without a hearing, is not an invasion of the rights of the court in the exercise of its judicial power. It does not preserve them "inviolate," as this glittering generality declares they intend to do. Again, "We believe, however, that the rules of procedure in the Federal courts with respect to the issuance of the writ of injunction should be more accurately defined by statute, and that no injunction or temporary restraining order should be issued without notice, except where irreparable injury would result from delay, in which case a speedy hearing thereafter should be granted," and that is exactly the law as it stands to-day. The convention said that when a temporary restraining order to restrain irreparable harm was issued without notice, a speedy hearing should be granted. That means that the judge who issued it should exercise his discretion speedily in determining whether or not the injunction should be continued. What does the bill do which is alleged to be a performance of the promise of the Republican party? It substitutes for the discretion of the judiciary the arbitrary fiat of the legislature, and dissolves the injunction within seven days, no matter whether the injury still threatens or not. It may be said that the literal fulfillment of the promise would be as puerile as the promise itself. If you are going to carry out a puerile promise, make the performance as puerile as the promise. If the law must be passed because of the *sacrosanct* character of the promise, then carry out the promise and go no further. The pending bill goes way beyond it and cannot be justified by the platform.

Now, I have a few more words I want to say about this great question. I cannot stop here. I do not propose to start in and discuss the legislation my friends insist upon.

I was much surprised, I am free to say, to hear my learned friend who has just addressed you quote a part, and a part only, of some English legislation on this question. I think I am entitled to say that he deliberately suppressed the balance of the statute from which he made the quotation. [For Mr. Ralston's reply to this charge, see page 118.—EDITOR.] My learned friend, Mr. Ralston, appeared before me, when I was a member of the Judiciary Committee of the House of Representatives and read this same extract

from this same English statute, when urging the passing of legislation before the American Congress which would exempt labor organizations from injunctions where the act, if committed by a single man, would not be a crime; but he failed to say then, as he did this morning, that there were important qualifications connected with the English statute which passed in 1875 and was amended in a material part in 1906.[1] I will call your attention right now to some of the profound qualifications that tend somewhat to discount the vividness of the suggestion made by him. I may say this: I do not think my learned friend had any particular occasion to leave the impression he gave you. [See Mr. Ralston's statement, p. 118. —EDITOR.] In my minority views that I wrote in 1902 I called the attention of Congress and the country, and my learned friend, to the fact that he then made the same suppression that he has made now. I do not know whether he ever read those minority views or not, but I assume he has read the statute, and that, therefore, he knows what I am going to call your attention to. It is true that the English statute provided that no one should be indicted for conspiracy for an act which, if done by a single individual, would not be a crime, yet in the same statute which was passed by Parliament—by the same omnipotent English Parliament, which can to-day, if it wishes, repeal the Magna Charta and deprive the citizen of the right of habeas corpus, because they have an unwritten constitution which does not restrain legislative action,—in that act they took care to make things punishable as crimes that I submit, without hesitation, are not punishable as crimes in any other civilized jurisdiction, either English or elsewhere. Let me call attention to some of them, and no intelligent conception of this legislation can be had, or obtained, except by a careful knowledge of these exceptions and limitations. The English statute provides, among other things, that nothing "shall exempt from punishment a party guilty of conspiracy for which punishment is awarded by any act of Parliament," so that act left them subject to indictment for all conspiracies then punish-

[1] An examination of Mr. Ralston's notes shows that while he did not quote the particular paragraph I had in mind when I replied, he did refer to and purport to state its effect when he said: "Even before this act was adopted the law of England had been liberalized, and, largely based upon the legislative expression of such liability, a bill was prepared and introduced into the House of Representatives of the United States, reading as follows," etc.

able. Second, "Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace or sedition, or any offense against the state or sovereign."

Let me go a little further. The third exception provided that "Where a person employed by a municipal authority or by any company or contractor, upon whom is imposed by act of Parliament the duty or who have otherwise assumed the duty of supplying any city, borough, town or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority, or company, or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place or part, wholly or to a great extent of their supply of gas or water, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months with or without hard labor."

Now, how much of a boycott would you think could be carried on successfully in England against the water company, or electric light company, which was responsible for the supply of water or gas to the inhabitants? The act of a single individual was made punishable as a crime. There is no such legislation in this country. No one found any legislation of that sort which they could use for the situation here in the last three or four weeks. A little further: "Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life or cause serious bodily injury or to expose valuable property, whether real of personal, to destruction or serious injury, he shall, on conviction thereof," be fined or imprisoned. Where would a boycott be on that proposition? How long could they carry it on successfully?

The fifth exception is found under the following proviso:

"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—

1. "Uses violence to or intimidates such other person or his

wife or children, or injures his property"—that is to say, whenever any individual either uses violence or intimidates any other person, or his wife or children, or injures his property, he is liable to fine and imprisonment.

2. A man cannot persistently follow another person about from place to place under this statute, in England, without such individual being guilty of a crime, punishable by fine and imprisonment. This did not occur to my learned friend when he gave you this legislation and when he gave it to my committee.

It is getting to be important that in these great discussions we should have all the facts. The statement of part of the facts is not particularly useful in reaching an intelligent and safe conclusion. If you have a good case there is no reason why you should suppress any of the important facts, especially when you expect to rely on part of that legislation to establish your contention. At least, that is my view.

(3) Provides fine and imprisonment for any one who "hides any tools, clothes or other property, or deprives him of or hinders him in the use thereof."

(4) Any one who "watches or besets the house or other place where such other person resides or works, or carries on business, or happens to be, or the approach to such house or place," is subject to fine and imprisonment.

(5) Any person who "follows such other person with two or more other persons, in a disorderly manner, in or through any street or road" shall be liable to fine or imprisonment.

Now, if human ingenuity can suggest any other thing that is done in connection with a boycott which is not specifically punishable by this act of Parliament when "committed by one person," I cannot imagine or conceive of it. Now, that would be a great boon, would it not, to the labor organizations? I submit to my friend that he is not using this audience in a candid manner. I submit to my learned friend that, after having presented this to my committee in 1902, and having characterized it since, without calling attention to these exceptions—I protest that it is not entirely candid in an institution of this kind, intended to produce intelligent thinking, to suppress the vital portions of a statute.

Now, my friends, I have taken a great deal more time than I intended to when I began. I close the whole discussion, so far as I

am concerned, with this final suggestion. This act of Congress which is now proposed is predicated upon the idea that there is neglect upon the part of the court in giving an oral hearing. Let me say this: Whenever a temporary restraining order is issued, it is open to the respondents, who are those restrained, to apply immediately to the chancellor issuing that order for a dissolution of the injunction. He does not have to wait one day or seven days. He can apply on the same day that the order is issued, and it is in the discretion of the court as to when the hearing shall be had.

I challenge the production of a well-authenticated case where a Federal judge (I do not say the judges are above criticism; the bench is fallible, it is finite, as is every other human institution)—but I challenge the production of a well-authenticated case where there has been an abuse of discretion by a Federal judge in a refusal to grant a speedy hearing on a motion to dissolve a temporary restraining order. The Federal judges are entitled to the approval expressed by the Supreme Court of the United States in the Young case, where the court said: "No injunction ought to be granted unless in a case reasonably free from doubt. *We think such rule is, and will be, followed by all the judges of the Federal courts.*"

Let me give you an illustration—one case which caused a great deal of disturbance in the House of Representatives and in the Senate. Great statesmen sitting there to legislate and deliberate upon great questions affecting the welfare of ninety millions of people, took occasion in public speech to assail Judge Dayton, of West Virginia, for issuing without notice a temporary restraining order, and making it returnable about thirty days after issuance. Several senators and representatives, and men holding high places, allowed themselves to become vigorously disturbed. The fact is that Judge Dayton did issue the order without notice. It was adjourned three times, and during that whole period, covering more than a year, this case of the Hitchman Coal Company was allowed to rest and the attorneys for the defendants never gathered themselves together sufficiently to even make a motion to dissolve that injunction, but had it continued on their own motion over a year. For that, Judge Dayton was without limit assailed, when the delay was wholly at the instance of the defendants, and in no sense the fault of the judge. That is one of the cases which, I understand,

is relied upon to justify this legislation. My learned friend on the other side will have some difficulty in finding any well-authenticated cases of abuse. On the whole, the Federal judiciary has discharged its duty in a way that is worthy of the approval and approbation of law-abiding, God-fearing, liberty-loving American citizens.

Mr. Ralston's Reply, Made at the Close of Mr. Littlefield's Address

In the heat of his discussion, Mr. Littlefield, accomplished speaker as he is, has been led into making statements which, I am sure, on cooler reflection he will be glad to withdraw. He has practically charged me with suppressing, before you, part of the trades union act of 1906. I may say that I have that written in full in the paper before you, and it was not read merely from consideration of time.

Mr. Littlefield has also stated that I was guilty of some suppression in appearing before the committee of which he had the honor to be a member, in the House of Representatives. I think he is slightly in error in his statement, as he made it. The act from which I read was passed in 1906, and my appearance before the committee of which he was a member was in 1902, and I feel that my prescience in 1902 was not sufficient to know what was passed in 1906; but if he means to say that at the time of my appearance I did not read all the act of 1871, I must say that may or may not be true. I have no recollection upon the point, but the question which was then before the house was exactly whether there should be given the modification of the statute which I have described and narrated to you fully, and I then contended, as I now contend, that peaceful boycotts ought to be absolutely out of the power of courts of equity. From the citation which Mr. Littlefield has read to you, and from the old act, which related not to peaceful boycotts, but to boycotts involving an element of wrong, which I did not then contend should escape the power of courts of equity, and do not now contend, it would have been impertinent and a waste of time to read the articles referred to to-day, and which were not involved in this discussion.

Statement by Mr. Littlefield, Following Mr. Ralston's Reply

I take great pleasure in saying, first, that I assume no responsibility for what my friend did not read. He read exactly what he read, and did not read what he said he did not read. Let him publish with his remarks the Act of 1875, and when he does he will see, as he knows now, that the Act of 1906 made an amendment in only one particular.

Let the gentleman publish with his remarks, as an appendix or otherwise, the Act of 1906 and the Act of 1875, and then if anybody takes pains to read this discussion later, let him state whether I have accurately stated this.

Appendix[2]

Comparative Summary Provisions of English Statutes of 1875 Concerning Conspiracy and Protection of Property, and 1906, Regulating Trades Unions and Trades Disputes.

As Mr. Ralston has not quoted the Act of 1875 and the Act of 1906, I quote so much of both of those acts in parallel columns as relates to substantive offenses and civil liability—the Act of 1906, with one exception, relating to civil liability only:

English Statutes, Vol. 10, 1875, Chap. 86 (38 and 39 Vict.).

An Act for amending the Law relating to Conspiracy, and to the Protection of Property, and for other purposes. (13th August, 1875.)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Conspiracy and Protection of Property Act, 1875.

2. This Act shall come into operation on the first day of September, one thousand eight hundred and seventy-five.

English Statutes, Vol. 44, 1906, Chap. 47 (6 Edw. VII).

An Act to provide for the regulation of Trades Unions and Trades Disputes. (21st Dec., 1906.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875:—

[2]The following appendix was prepared by Mr. Littlefield subsequent to his address.—[Editor.]

Conspiracy, and Protection of Property.

3. An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offense against the state or the sovereign.

A crime for the purposes of this section means an offense punishable on indictment, or an offense which is punishable on summary conviction, and for the commission of which the offender is liable under the statute making the offense punishable to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

4. Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place or part, wholly or to a great

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months with or without hard labor.

Every such municipal authority, company, or contractor as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company, or contractor, a printed copy of this section in some conspicuous place, where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.

5. Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor.

Miscellaneous.

6. Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing,

medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labor.

7. Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

(2) Persistently follows such other person about from place to place; or,

(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

(4) Watches or besets the house or other place where such other person resides or works, or carries on business, or happens to be, or the approach to such house or place; or,

(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

Shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

8. Where on any Act relating to employers or workmen a pecuniary penalty is imposed in respect of any offense under such Act, and no power is given to reduce such penalty, the

2. (1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

(2) Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from "attending at or near" to the end of the section.

justices or court having jurisdiction in respect of such offense may, if they think it just so to do, impose by way of penalty in respect of such offense, any sum not less than one-fourth of the penalty imposed by such Act.

3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.

4. (1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

I also quote an extract from the minority views filed by me as a member of the Judiciary Committee of the House of Representatives in 1902:

THE ENGLISH LAW.

An examination of the origin of the legislation which is relied upon as the precedent for this bill will, perhaps, be instructive. Jackson H. Ralston, Esq., an attorney-at-law and counsel for the Federation of Labor, drew this bill and appeared before the committee during the last Congress in advocacy thereof. As to the precise language of the bill and the precedents therefor he used this language at the hearing:

"I want to say that upon examination of the statute law of other jurisdictions I found that the Parliament of England had met the very condition that seemed to be confronting the labor organization here, and in the act known as the 'Trades Union Act of 1875,' Parliament had provided that where an act could be committed by an individual and not be criminal, the same act, if committed by a number of individuals in combination, could not be made the subject of the criminal-conspiracy law or could not be deemed a criminal act.

"The Chairman—What was the date of that act?

"Mr. Ralston—That act was passed in 1875.

"Mr. Parker—Does it apply to all acts, no matter what they are?

"Mr. Ralston—In relation to trades disputes.

"Mr. Parker—It would not, therefore, apply to a boycott?

"Mr. Ralston—Yes; it would apply there absolutely.

"The Chairman—Even if they starved the man to death?

"Mr. Ralston—Yes, sir; it would apply to an act of that kind, and for this reason: That any man has a legal right to purchase from any other man that he chooses, and there is a correlative right in every man to refuse to sell him his goods. That is right."

Very clearly giving to the committee the impression that the language which he quoted as being the substance of the English law was a correct statement of the scope of that legislation. And upon this same point, more effectively impressing the committee with the idea that he was simply asking in substance a re-enactment of the English statute, and leaving upon their minds the impression that its scope, operation and effect had been accurately stated by him, he said further:

"Continuing the argument I had in mind, I have stated, I think correctly, the law under this Act of 1875. Now the Trades Union Act was followed in Maryland in the Act of 1884. I have here the Maryland act as it was incorporated in the code of 1888. The language is as follows:

"'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as an offense. Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or any offense against any person or against property.'

"That is, as I say, the language of the Maryland Act of 1884.

"Mr. Parker—And that was the language of the English Act of 1875?

"Mr. Ralston—Almost identically the language of the English act and the language which has been followed in the bill now before the committee."

Thus, very clearly leaving upon the mind of the committee the impression that he had accurately stated the scope of the English statute. The quotation which Mr. Ralston made from the Maryland statute is accurate, and the effect of making the quotation is only to intensify the impression that he had also accurately stated the scope of the English statute. This presentation of the English statute, with the idea that Congress was to accept it as a legislative precedent in legislating upon this subject was a very serious misconception of the scope of the English law. The fact is, as the brief analysis of the English statute which is given below will show beyond all possible peradventure, that the English statute when accurately stated is very much narrower in its scope than the language used by Mr. Ralston in stating the English law, and is, in fact, by numerous limitations and restrictions upon its operation, not only practically innocuous, but extremely oppressive in its operation upon laboring men, as it creates offenses theretofore unknown in the English law and never yet made nor attempted to be made criminal in any American jurisdiction.

What Mr. Ralston did was to take one section of a chapter nearly word for word, disconnect it from at least eight distinct and specific provisions which narrowed and limited the scope of its operations. The section which he quoted as a legislative precedent for our action reads as follows, and is a part of the Conspiracy and Protection of Property Act of 1875:

"An agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime."

The first exception reads as follows:

"Nothing in this section shall ex-

empt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any act of Parliament."

Just what the scope of this exception is could not be stated in detail without an examination of the statutory law of England to ascertain as to what particular subjects the law of conspiracy applies.

The second exception is:

"Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offense against the state or the sovereign."

The third exception provides:

"Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury, he shall, on conviction thereof by a court of summary jurisdiction or indictment, as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor."

The scope of this exception will be appreciated when it is considered that it is not infrequently the "probable consequence" of a strike to expose valuable property—a man's business is certainly "valuable property"—to serious injury, and wherever there is reasonable cause to believe that such consequences are probable, it is very clear that a single individual, independent of conspiracy, who "wilfully and maliciously" violated his contract of service or hiring with that end in view, would be punishable under the English law by fine and imprisonment. Such an act, it is believed, is not made a crime in any jurisdiction in this country, and it is thought that the Federation of Labor, which desires this legislation, would protest with great vigor, and properly so, against the enactment of a statute which would make such an act on the part of a single individual punishable by fine and imprisonment. We only call attention to the exceptions which would affect laboring men, as this legislation is requested and urged principally by the labor organizations for the purpose of ameliorating their condition.

The fourth exception limiting the scope of this provision of the English law provides that every person who uses violence to or intimidates any other person, or his wife or children, or injures his property with a view to compel such other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority, "shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor."

The fifth exception provides that whoever for the same purpose persistently follows such other person about from place to place should be punished in the same manner.

The sixth exception provides that whoever for the same purpose "hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof," shall be punished in the same manner.

The seventh exception provides that whoever for that purpose "watches or besets the house or other place where such other person resides or works or carries on business or happens to be, or the approach to such house or place" shall be punished in the same manner.

The eighth exception provides that whoever, for the same purpose, "follows such other person with two or more other persons in a disorderly manner in or through any street or road" shall be punished in the same manner.

All of these provisions, with the possible exception of some phases of that included in the fourth subdivision creating new and additional criminal offenses upon the

part of laboring men, and especially laboring men engaged in the familiar methods universally employed for the purpose of alleviating their condition by strikes. In no instance in any jurisdiction in this country are any of those acts, except possibly some included in the fourth subdivision made punishable as crimes. It may be safely said that legislation of that sort would not be tolerated for a moment by any of the organizations which are interested in the passage of this bill.

Instead of ameliorating the condition of the laboring man, who desires to avail himself of the right of the strike or the boycott provisions of the law, such as exist in the English statute, they narrow and restrict the scope of the operation of the general provision which was, presumably under a misapprehension, cited to us as a precedent for this bill. The enactment of such drastic and oppressive provisions would place every laboring men in a straitjacket and practically destroy the efficiency of every labor organization in the country. Yet when fairly stated the provision relied upon as a precedent for this bill should have been stated, and should be stated with all of these qualifications and restrictions.

It is not credible that the Federation of Labor would advocate the adoption of the English statute from which this extract upon which they rely as a precedent was made, creating as it does so many new offenses aimed explicitly and expressly against laboring men and labor organizations. When considered in connection with Federal legislation the application of these suggestions is necessarily confined to their effect upon interstate trade and commerce. A bill similar to this was reported by the Judiciary Committee in the last Congress (H. R. 8917, Report No. 2007), but at the time of making the report the attention of the committee had not been called to the provisions above referred to in the English statute, but had, in fact, as the result of the partial statement of the counsel, been diverted therefrom. For that reason no allusion was made to it in that report.

USE AND ABUSE OF INJUNCTIONS IN TRADE DISPUTES

III. ADDRESS BY JAMES A. EMERY, ESQ.,
General Counsel, National Council for Industrial Defense, Washington, D. C.

Mr. Chairman, Ladies and Gentlemen:

I thank the chairman for his kind words, and I hope to be brief enough under the circumstances of the hour not to repeat the fault of that great Englishman of whom it was said, "That he went on refining while others thought of dining." The extent of the subject and the limitation of time permits no more than a fragmentary discussion, and I can hope to do no more than respond in outline to the leading criticisms of the gentlemen who have preceded me in the light of a few of the equitable principles which I shall call to your attention.

With all due respect to the distinguished gentleman who has just concluded, his discussion seems to me an excellent illustration of the confusion that is bound to arise through failure clearly to grasp the peculiar powers of equity and the function of the injunctive remedy. The gentleman defended vehemently that which he but half-apprehended, like the ancient Bardolph, whose valor was more certain than his understanding: "Accommodated, it is a Christian word and by my sword I will defend it. Accommodated—that is, when a man is—that which—whereby—he may be thought to be—accommodated. Which is an excellent thing."

The gentleman declares, but undertakes to prove by reiteration rather than demonstration that an injunction issues to protect only property rights, and that the rights usually involved in what are commonly termed labor disputes are not even property rights, and therefore a court of equity, through the injunctive remedy, has usurped a jurisdiction in violation of precedent and right. The injunction is no modern device. It is not the invention of a recent day—an outgrowth of modern ingenuity. The ancient writ has been for centuries the chief instrument of equity. The principles of its use are determined by the decisions and practice of centuries, its application to organizations of labor is but a modern phase of its continuing use through many decades to prohibit attacks by combination upon rights which it is its peculiar office to protect. These

rights, the gentleman to the contrary, are *"civil"* and property rights, rights characterized by the courts as "those of a pecuniary nature." The gentleman rests his appeal and his argument on moral no less than legal grounds, but I cannot find within his narrow definition that vast body of rights which the settled law of many centuries has held within the protection of the injunction. Indeed, I should be interested in knowing upon what theory of morals it could be contended that it was right to issue a restraint to protect a man's house or his business or his horse, and not himself.

The gentleman's theory of a property right is that of mere ownership in a house or lot, of lands and personalty. "The right of property in man," he says, "was destroyed by the emancipation of the slave." Nay, man's property in himself was recognized by the emancipation of the slave, for the first and most elemental of all property rights is that of man in his own labor. The foundation of all property right, it is the one treasury possessed by each individual, and from which he pays in the sweat of his face his way through the world. But he owns the labor of his head no less than that of his hands, of his pen no less than that of his pick, of his learning no less than its product, of his profession no less than his trade. Every exercise of mind or body possessing value is property as much as the coat on his back or the hat on his head, the house in which he lives, or the land whose fruits sustain his life. Nay, more, we dispose of that which we have and acquire the possessions of others only through agreement, and therefore the most commonplace and necessary, indeed, socially, the most indispensable, of property rights is the right of contract. These rights are universally recognized not merely by the technical rulings of generations of judges, but by the common sense of mankind. Every one who sits within sound of my voice has sold or bought labor, and must continue not only to do so, but to maintain the right to do so, "for so the whole world moves around." "No right of property or capital," said Lord Bramwell, "was so sacred or carefully guarded by the law of the land as that of personal liberty." The constitutional guarantee of "liberty and property," interpreted by the Supreme Court of the United States, embraces not merely the right of the citizen to the free use of his powers and faculties in all lawful ways to live and work at any trade, profession or business, but "for that purpose to enter into all contracts that may be proper, necessary and essential in his carrying out the purposes mentioned."

The Anthracite Coal Strike Commission epitomized the civil and moral law by saying:

> The right and liberty to pursue a lawful calling and to lead a peaceable life, free from molestation or attack, concerns the comfort and happiness of all men, and the denial of them means the destruction of one of the greatest, if not the greatest, of the benefits which the social organization confers.

Thus we see as a matter of common sense and common law that not merely is the plant of the manufacturer, the store of the merchant, the farm and equipment of the farmer, the tools of the mechanic, the pick of the laborer, the property of each, but it is likewise the property right of each to use them in any lawful manner, and the skill with which they are used is no less the property of him who possesses it than the instrumentalities and properties through which it is exercised. So it must be obvious to you and me, evidenced by our daily experience, apparent in our customs, embedded in our law and confirmed by our courts that the civilization of which we are a part rests upon the fact that not only are our lands and chattels property, but the rights by which we acquire and dispose of them and use them to our own profit and our neighbors' benefit, as well as the peculiar qualities and powers of mind and body that may be turned to our pecuniary advantage, are rights of property and entitled to protection as such, however intangible they may be, as much as those tangible physical objects which the eye sees and the hands feel.

When we exercise these rights in commerce and industry, earning a reputation for skill in manufacture, honesty and enterprise in trading, and custom accrues to us; that reputation which we have in the minds of others because of the quality of our product, the character of our workmanship, the promptness with which we pay our debts, and all those circumstances and incidents that contribute to give us esteem in the judgment of the buying public, constitute a property right as valuable as store and factory and skill themselves, and we term it the goodwill of business. We frame our statutes and enforce our laws in recognition of that fact. The Sherman act was framed upon this very theory, giving triple damages for injury to a business. The Wilson, Dingley and Payne tariff acts each recognized this principle in some of their provisions, and it is a common transaction of the commercial world so widely

recognized as to come within the knowledge of all men that the goodwill of a business is not only a separate and distinct property from the physical instrumentalities used in the transaction of business, but that goodwill is frequently bought and sold without reference to the realty or chattels in the use of which it has come into being.

The rights I define and enumerate are not rare and recondite. The daily press familiarizes each of you with the progress of actions brought to vindicate injuries done to them. You hear of suits for libel, of actions in damages for the misuse of trademarks, business symbols, infringements upon patents, the printing of books or the singing of songs, the use of plays, without permission. It excites no comment, it produces no confusion of mind, if a suit at law is brought to compensate some injured individual for a loss sustained by a trespass upon any of the property rights I mention. How, then, shall you deny the right of a court of equity to interfere under proper circumstances to protect these rights from injuries of such a nature that no proceeding at law will secure compensation. For this is a world of conflicting rights, and our own freedom and privilege of conduct are measured by the equal privilege and freedom of every other citizen with whom we come in contact. You will remember the familiar but happy illustration of the limits of liberty of action suggested by the drunken man who shook his finger in the face of a stranger, and when the other protested, said: "This is a free country; I have a right to shake my finger in your face." The sober one answered: "Your right to shake your finger ends where my nose begins." So it is with a variety of rights which are the subject of daily litigation in our courts and regulation in our legislatures. But every injury which may be worked upon one or many, or which many may work upon one, is not of such a nature that it can be compensated for in damages. The punishment of crime repairs no loss wrought by the criminal. Injury is, as we all realize, sometimes of a character for which there could be no pecuniary relief, either because the wrong done was of a nature that money could not measure, or a successful proceeding would be barren of actual recovery because of the financial irresponsibility of the wrongdoers, or their number being so great as to require an impracticable multiplicity of actions or their identity would be unascertainable.

Under such circumstances, which are not of infrequent occurrence, lawsuits would be of no avail, and if the person injured or threatened with injury must abide the event and await the infliction of damage under circumstances which did not permit of recovery, the person injured or threatened with injury would be without any remedy. He would face the damage or destruction of property and the impairment of rights without legal defense or redress. A legal system so defective would be a disgrace to civilization. The condition fortunately does not exist, for here equity offers the remedy which is essential to complete and perfect our judicial scheme. Where damage threatens what would be of an irreparable nature, equity supplies the absence of an adequate remedy at law by preventing the infliction of the injury.

A few years ago the State of Missouri entered into the Supreme Court of the United States and complained that its sister State, Illinois, was constructing a drainage canal from the city of Chicago which would discharge along the shores of Missouri a vast amount of noxious sewage and drainage, which would not only injure the property of the citizens of Missouri, who could not sue the State of Illinois, but threatened their lives and health and that of their children, and the State of Missouri sought to restrain the proposed action of the State of Illinois, until at least defects in the construction of the drainage canal could be remedied and the conditions anticipated would not come into being.

The late Justice Brewer, in an address delivered in Brooklyn, N. Y., in November last, called attention to this remarkable case, and commented upon the pitiable condition that would have existed had the Supreme Court of the United States been compelled to leave the citizens of Missouri to wait in fear and anxiety the coming of a flood bearing pestilence and death, with no power in the nation to stay its approach.

"Government by injunction," said Justice Brewer, "has been an object of easy denunciation. So far from restricting this power, there never was a time when its restricted and vigorous exercise was worth more to the nation and for the best interests of all. . . . The best scientific thought of the day is along the lines of prevention rather than that of cure. We aim to stay the spread of epidemics rather than permit them to run their course, and attend solely to the work of curing the sick. And shall it be said of the law, which claims to be the perfection of reason and to express the highest thought of the day, that it no longer aims to prevent the wrong, but limits its action to the matter of punishment?"

The critics of the injunction are doubtless quite willing to admit the proprietary and necessity of its application to all but cases where their own ox is gored, but here is the rub: in labor disputes, the gentleman argued, strikers are enjoined from doing acts in combination which if done by individuals would be lawful; and, second, they are restrained from doing perfectly innocent acts; and, third, the rights of others they are enjoined from interfering with are not rights of a property nature.

It is a fundamental proposition in this government that there cannot be one set of rights for one class of citizens, and another set for another class under the same circumstances. The right to the protection of a court of equity cannot rest upon the character of the persons from whom the protection is sought. The office of equity is to prevent; that of law to compensate. The right to the preventive remedy is as great as the right to the compensatory remedy. Equitable protection is constitutionally guaranteed as fully as legal protection. The right to that protection is predicated upon the character of the wrong—not of the persons who threaten it. To deny an injunction under circumstances in which it should issue, whether in a labor dispute, a trespass, an infringement of a patent, a restraint of trade, the maintenance of a nuisance, or any other set of circumstances which presents grounds of equitable intervention is to deny to the citizen due process of law. Therefore a citizen is entitled to an injunction in a labor dispute as much as in any other controversy, if in the course of it the combination of laborers threaten his property with irreparable damage, just as under the same circumstances he would be entitled to an injunction against a combination of business men that undertook to injure his patent or his trade, or to maintain a nuisance damaging to his home or place of business.

The argument that a combination of men ought not to be enjoined from doing that which it is not unlawful for one man to do is not peculiar to labor disputes. It was argued by counsel for the defendant in the case of Montague *vs.* Lowry, 193 U. S., 38, and rejected by the Supreme Court, as the principle has likewise been rejected in a variety of criminal and civil proceedings in courts of final appeal, both in England and the United States. For not only does a combination of many possess a power beyond that of any individual, but when it is organized and acts to accomplish a par-

ticular purpose, it is itself a new entity in which the judgment and will of the individual components is subordinated to the purpose and motive of the combination. The power of one man to coerce or intimidate or threaten is obviously a very different matter from similar actions by numbers acting in concert, whose very presence becomes in itself a menace to the peace of mind and the right to the free flow of custom possessed by a person who, for instance, becomes the recipient of the attentions of a labor combination in a labor dispute.

But it is said injunctions are frequently issued in labor disputes which forbid the doing of acts in themselves innocent and lawful. So it is said men have been enjoined from using the streets and roads, from talking to others, from even using "persuasion" or visiting the homes of men who did not join in a strike. "No conduct," said Justice Holmes, in Aikens *vs.* Wisconsin, 195 U. S., "has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

Suppose a man is arrested at night, walking up and down the sidewalk before a residence. At least let us suppose this is his explanation to a police judge before whom he is brought by the arresting officer: "Have I not a right," says the defendant, "to the free use of the public streets. Is it a crime to use a sidewalk where my presence does not obstruct its equal use by every other person?" But suppose the officer and other witnesses prove that the defendant used the sidewalk and was in front of the residence in question for the purpose of giving warning to a fellow-thief engaged in the looting of the residence, does the innocent act of using the public sidewalk relieve the accused person of punishment in view of the purpose for which he was there? Yet the distinguished lawyer who opened this discussion intimated that motive was worthy of small consideration in discussing the use of injunctions in labor disputes. Moreover, I need not say to this intelligent audience that a combination, maliciously to persuade or induce men to make a breach of contract was and is unlawful in all forms of human action outside of labor disputes.

The charge of enjoining alleged innocent acts is frequently

based upon a superficial or fragmentary reading of particular injunctions. Thus we find in some injunctions that have been sharply criticised that men were enjoined from marching on a public highway where their purpose was to prevent other workmen equally entitled to the use of the highway from going to or returning from their work, and men have been likewise enjoined from using the public streets for the purpose of threatening or annoying or maliciously persuading others equally entitled to the use of the streets from entering or departing from a boycotted place of business. Then, too, the word "persuasion," which has been and is so frequently made the subject of harsh criticism, has never been used in an injunction except in connection with other phrases forbidding conduct of an unlawful character. No rule of interpretation is better settled than that where a number of phrases are used the concluding word of many terms shall be given construction as of the same general class as the previous phrases. Thus the word "persuasion" is merely used as a general inhibition of "persuasion" of the same general kind as that previously prohibited in the writ.

Finally, I have said that it is frequently objected that the rights protected in labor disputes are not those of a pecuniary nature. If property rights were held to be merely those rights to the possession of realty and chattels to which the gentleman who preceded me endeavored to confine the term, the objection might be well founded, but we have seen that there is a universal recognition in custom and practice, as well as in the adjudicated law of our land, that the right of property includes the right to make contracts for the sale or purchase of labor, and the right to the goodwill of business as distinct from the physical instrumentalities of the business itself.

In the ordinary course of a labor dispute, the strikers organize for the purpose of preventing others from taking their places. To the point where the striker peaceably presents his claims, either to those who seek work or those who have remained at work, he is obviously within his rights, but when individually or in combination with others, he intimidates or threatens by words or actions or annoys and destroys the peace of employer, employee or customer, he has passed the limit of his own rights and intrudes upon the equal right of others to conduct their business in a lawful manner, to give their custom where they will, or to dispose of their labor and work under the conditions that seem to them best. The protection of that

fundamental right is the protection of that principle from which the striker's own freedom springs, and if he deny or combine to destroy it in others, he cannot long hope to keep it for himself.

Perhaps the charge most vehemently pressed by critics of alleged abuse by injunction is that the writ is issued against acts which are crimes, and through proceedings in contempt the persons committing those acts are deprived of trial by jury, although the offense for which they are punished is of a criminal nature. This charge pressed with much plausibility, fades before the simple distinction between the various qualities of any act within the prohibition of the court of equity. The simplest mind can perceive at a glance that any human act may have both moral and mental qualities. It might be good mentally and bad morally. So, too, any act of one human being which endangers another may, like a trespass, be at once the subject of criminal prosecution and subsequent civil action in damages. A man who assaults another may be punished by the state for his crime and sued by the individual for his tort. So, too, an act forbidden by an injunction may, through the spectacles of criminal law, also constitute a crime, but a court of equity in a contempt proceeding punishes only the violation of its order and not the criminal offense which may be committed at the same time. The distinction which I suggest, which must appeal to any intelligent layman, was very clearly put in the decision of Judge Woods in the proceedings in the Circuit Court against Eugene Debs, charged with contempt of an injunctive order:

> The jurisdiction of the courts of equity, and by implication their right to punish for contempt, are established by the constitution, equally with the right of trial by jury; and so long as there is no attempt to extend jurisdiction over subjects not properly cognizable in equity, there can be no ground for the assertion that the right of jury trial has been taken away or impaired. The same act may constitute a contempt and a crime. But the contempt is one thing, the crime another; and the punishment for one is not a duplication of the punishment of the other. The contempt can be tried and punished only by the court, while the charge of crime can be tried only by a jury. *U. S.* vs. *Debs,* 64 Fed. Rep., 746.

The gentleman preceding me has asserted with great earnestness that each man is entitled to bestow his patronage where he pleases, and that he may give or take it, like his labor, from any whom he pleases, for a good reason or none at all, and that is true. Equity

intercepts his action only when he combines with others to injure third parties by preventing other workmen or the public from exercising the same liberty which he demands for himself. The purpose of joining in a boycott may be, by compelling an employer to grant the demands made upon him, to benefit ultimately the cause of labor, or immediately that of the striking employees, but the alleged purpose is remote in comparison with the proximate and immediate effort to injure or destroy the lawful business of another by frightening away workmen and customers in order to compel the person boycotted, by virtue of the injury inflicted, to accede to the demands of the boycotters. This is the mere effort of many to work their will upon one; the coercion of an individual by force of numbers, the individual possessing the same right to pursue his own way and to conduct his own business within lawful limits that each member of the combination has to conduct his.

In these collisions, equity must proceed to employ its time-honored remedies upon the same principle repeatedly invoked throughout the history of our jurisprudence. If that principle does not permit the use of the injunction to restrain damaging assaults upon individual rights and property by strikers seeking to enforce their will by destructive coercion and intimidation, and in ruthless disregard of the equal rights of others, then the striker himself can find no principle of equity which lends its strong arm to his service, or that of the government when it seeks to protect him against vast combinations in restraint of trade, whose powers and activities continually excite the attention of the popular mind. If the principles upon which the issuance of an injunction in a labor dispute is predicated cannot be sustained by the immemorial principles of that branch of jurisprudence and the continuous practice of chancery courts in England and America, then no exercise of that remedy in all the vast field of equity can be excused or defended.

USE AND ABUSE OF INJUNCTIONS IN TRADE DISPUTES

IV. Address by Andrew Furuseth, Esq., Washington, D. C.

Coming after such a gentleman as Mr. Littlefield, I must ask you to be patient with me in what I have to say. I have not his ready tongue nor his training as a special pleader. I shall try, in a few words, to convey to you what we, who suffer under the misuse of the equity power, think is the real cause of the wrong, and point to a cure.

I am sorry that Mr. Littlefield has gone, because I wanted to ask him to define more specifically what he means by some things that he has said here.

He speaks of "judicial power." It would be well, if he will, when correcting the notes, state if he means the power of the judiciary as understood and exercised in England at the time when our constitution was adopted, and with possibly slight modifications conferred upon our judiciary, or does he, in speaking of judicial power, have in mind the power exercised by the Roman emperors? It would be a great help to understand what he means.

He speaks of obedience to law. I want to say for the workmen of the United States that they do not come before you, nor before anybody, to ask exemption from any law. What we complain of, and what we believe we have a right to complain of, is that we are not getting law, but judicial discretion. He says that the equity power is to remedy and to prevent wrong. If that be so, of what use is law and law courts? I would like him to say, in his notes later on, what law is; if it is not an injunction issued by the whole people through their legislative department; whether it is not usually a simple "Thou shalt not." He says that equity power ought to protect personal rights. Where that will lead us I shall try to explain in a short statement which I shall read later. He speaks of the English law forbidding men to quit work; you have noticed, if you followed him closely, and I am sure you did, that every phase of that law deals with those who work in steam, water and gas plants, and where a man leaves his job in such a way as to endanger the life of others. The British Government has dealt with

that; so has ours. We go to the legislative branch of the government for any alteration in laws which we feel to be urgent; we do not come to the judges and ask them not to enforce, or to make, law. We realize, ladies and gentlemen, that there is a fundamental distinction between law and equity.

The modern use of the writ of injunction, especially in labor disputes, is revolutionary and destructive of popular government. Our government was designed to be a government by law, said law to be enacted by the legislative branch, construed by the judiciary and administered by the executive. An injunction is "an extraordinary writ issued out of equity, enjoining a threatened injury to property or property rights, where there is not a plain, adequate and complete remedy at law."

The definition of equity is: "The application of right and justice to the legal adjustment of differences where the law, by reason of its universality, is deficient," or "that system of jurisprudence which comprehends every matter of law for which the common law provides no remedy, . . . springing originally from the royal prerogative, moderating the harshness of the common law according to good conscience." In other words, it is the exercise of power according to the judgment and conscience of one man. It was for this reason that in Great Britain, whence the United States derives its system of equity, as well as of law, the equity power was limited to the protection of property or property rights, and to such cases only where there was no remedy at law; the words "adequate and complete" have been added here.

When the courts of equity issue injunctions in labor disputes, they do so to protect *business,* which, under late rulings by several courts, is held to be *property.* These rulings are disputed and condemned by other courts, which hold that relations between employers and employees—between buyer and seller—are *personal* relations, and as such, if regulated at all, are regulated by statute or common law only. If the latter contention be right, and of this we believe there can be no question, the ruling that makes business *property,* or the right to carry on or continue in business a *property right,* is revolutionary, and must lead to a complete change not only in our industrial, but in our political life. If the court of equity be permitted to regulate *personal* relations, it will gradually draw to itself all legislative power. If it be permitted to set aside or to

enforce law, it will ultimately arrogate to itself jurisdiction now held by the law courts, and abolish trial by jury.

The constitution confers equity power upon the courts by stating that they shall have jurisdiction in law and in equity, in the same way that it makes it their duty to issue the writ of habeas corpus and in substantially the same way as it provides for trial by jury. Equity power came to us as it existed in England at the time of the adoption of our constitution, and it was so limited and defined by English authorities that our courts could not obtain jurisdiction in labor disputes except by the adoption of a ruling that *business is property.* If business be property in the case of a strike or a boycott, and can therefore be protected by the equity court against diminution of its usual income, caused by a strike or boycott conducted by the working people, then it necessarily must be property at other times and therefore entitled to be protected against loss of income caused by competition from other manufacturers or business men. Business and the income from business would become territorial, and would be in the same position as land and the income from land. The result would be to make all competition in trade unlawful; it would prevent any one from engaging in trade or manufacture unless he comply with the whims and fancies of those who have their trade or means of production already established. No one could enter into business except through inheritance, bequest or sale. In order to show the fallacy of this new definition of property, we here state the accepted legal definitions of *property, business* and *labor.* Property means the dominion or indefinite right of user and disposition which one lawfully exercises over particular things or subjects, and generally to the exclusion of all others. Property is ownership, the exclusive right of any person freely to use, enjoy and dispose of any determinate object, whether real or personal. (English and American Encyclopedia of Law.) Property is the exclusive right of possessing, enjoying and disposing of a thing. (Century Dictionary.) A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition, from himself and his successors. (Austin, Jurisprudence.) The sole and despotic dominion which one claims and exercises over the external things of the world in total exclusion of the right of any other individual in the world. (Blackstone.)

It will be seen that property means products of nature or of labor, and that the essential element is that it may be disposed of by sale, be given away, or in any other way transferred to another. There is no distinction in law between *property* and *property rights.*

From these definitions it is plain that labor power or patronage cannot be property, but aside from this we have the thirteenth amendment to the constitution, prohibiting slavery and involuntary servitude. Labor power cannot be property, because it cannot be separated from the laborer. It is personal. It grows with health, diminishes in sickness, and ceases at death. It is an attribute of life. The ruling of the courts makes of the laborer a serf of patronage, an evidence of servitude, by assuming that one may have a property right in the labor or patronage of another.

What is the definition of business? That which occupies the time, attention and labor of men for the purpose of livelihood or profit; that which occupies the time, attention and labor of men for the purpose of profit and improvement. (American and English Encyclopedia of Law.) That which busies, or that which occupies the time, attention or labor of one as his principal concern, whether for a longer or shorter time. (Webster's Dictionary.)

What is labor? Physical or mental effort, particularly for some useful or desired end. Exertion of the powers for some end other than recreation or sport. (Century Dictionary.)

It will be seen from the above definitions, that, while there is a fundamental difference between *property* and *business,* there is none at all between business and labor, so that, *if business be property, so is labor,* and, if the earning power of business can be protected by equity power through injunction, so can the earning power of labor; in other words, the laborer may obtain an injunction against a reduction of wages, or against a discharge which would stop the wages entirely. If this new definition of *property,* by including therein business and labor, be accepted, then the judge sitting in equity becomes the irresponsible master of all men who do business or who labor.

We contend that equity, power and jurisdiction—discretionary government by the judiciary—for well-defined purposes and within specific limitations, granted to the courts by the constitution, has been so extended that it is invading the field of government by law and endangering constitutional liberty; that is, the personal liberty

of the individual citizen. As government by equity—personal government—advances, republican government—government by law—recedes.

We have escaped from despotic government by the king. We realized that, after all, he was but a man. Are we going to permit the growing up of a despotic government by the judges? Are not they also men? The despotism of one can in this sense be no better than the despotism of another. If we are to preserve "government of the people, by the people and for the people," any usurpation by the judiciary must be as sternly resisted as usurpation by the executive.

What labor is now seeking is the assistance of all liberty-loving men in restoring the common-law definitions of *property*, and in restricting the jurisdiction of the equity courts in that connection to what it was at the time of the adoption of the constitution. A bill has been and now is before Congress for this purpose. We ask your careful consideration of the reasons for this bill and of the bill itself, and your assistance in inducing Congress to make it a law.